Supreme Court, U.S.
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No. 06-881

In the Supreme Court of the United States

Billeigh H. Riser, Jr.,

Petitioner,

v.

Target Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a race discrimination Plaintiff in a Title VII/Section 1981 action present sufficient evidence of pretext to survive summary judgment by showing that the criteria Defendant articulates as its legitimate nondiscriminatory basis for discharge of Plaintiff were never applied to any other employee of Defendant?

II. When a race discrimination Plaintiff presents evidence that discredits the articulated legitimate nondiscriminatory basis upon which defendant relies, is a jury entitled to find in Plaintiff's favor, precluding summary judgment in Defendant's favor?

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CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is reported at *Riser v. Target Corporation*, 458 F 3d. 817 (8th Cir. 2006), and reprinted at A-1 through A-8. The decision of the United States District Court for the District of Minnesota in case number 03-CV-6094 JNE/JSM, was issued on October 11, 2005, and is unreported. The decision is reprinted at A-9 through A-18.

STATEMENT OF BASIS OF JURISDICTION

The Court of Appeals decision in this matter was issued on August 17, 2006, and judgment was entered on that same date. Plaintiff filed a timely petition for rehearing and petition for rehearing *en banc* in this matter and the order denying the petition for rehearing and rehearing *en banc* in this matter was issued on September 22, 2006. Appendix at A-19. This Court has jurisdiction to consider this matter on Petition for Writ of Certiorari pursuant to 28 USC § 1254.

STATUTES INVOLVED

42 USC. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 USC §2000e-2. Unlawful employment practices

(a) Employer practices.

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Plaintiff Billeigh Riser ("Riser") filed suit in the United States District Court for the District of Minnesota alleging that he had been discharged by Defendant Target Corporation ("Target") on the basis of race in violation of Title VII of the Civil Rights Act of 1991, 42 USC §1981, and the Minnesota Human Rights Act. The United States District Court for the District of Minnesota had jurisdiction over the matter pursuant to 28 USC §§1331 and 1337, because the action arose under laws of the United States relating to civil rights. The United States District Court for the District of Minnesota had jurisdiction over the pendant state human rights action pursuant to 28 USC § 1367. The District Court action was resolved by an entry of summary judgment in Defendant's favor and the United States Court of Appeals for the Eighth Circuit had jurisdiction for the appeal of that dismissal pursuant to 28 USC § 1291.

Since summary judgment was granted in Defendant's favor in this action, if this Court grants review it will review the decision of the Court of Appeals *de novo*. In reviewing a grant of summary judgment, this Court must take the facts in the light most favorable to Riser including all reasonable inferences that can be drawn from those facts, in determining if judgment is appropriate in Target's favor. For purposes of this petition, the Court must accept the following facts as true:

Riser was hired by Target on November 11, 2001, as an Executive Team Lead in training ("ETL-IT"), which constitutes a management position within the Target Corporate structure. See Deposition of Billeigh Riser ("Riser Depo") at p. 84, Appendix at A-27; Defendant's Answer to Interrogatory No. 9, Appendix at A-58; Deposition of Craig Rothfolk ("Rothfolk Depo") at p. 22, Appendix at A-48.

ETL-ITs were normally given a six-week "business college" training before they were assigned to individual stores. Deposition of Elizabeth Brown ("Brown Depo") at

pp. 13-14, Appendix at A-32 through A-34; Deposition of Desiree Lienhard ("Lienhard Depo") at p. 10, Appendix at A-39 through A-40. Riser and the other ETL-ITs hired at the same time, however, were put through an abbreviated one week "business college" course before being assigned to a store because they were needed immediately for the Christmas rush. Brown Depo at pp. 13-14, Appendix at A-32 through A-34; Deposition of Chris Halvorson ("Halvorson Depo") at p. 20, Appendix at A-71. Riser and his business college classmates did return for additional training after the Christmas rush was over. Brown Depo at pp. 13-14, Appendix at A-32 through A-34.

Riser was assigned to the Apple Valley, Minnesota store for further training. Riser worked the night shift as an ETL-IT at the Apple Valley store. Defendant's Answer to Interrogatory No. 9, Appendix at A-58. The night ETL positions are referred by Target as ETL-Flow. Riser was the only African-American ETL at the store and the only African-American ETL-IT in his business college class. Brown Depo at p. 35, Appendix at A-35; Deposition of Chris Simon ("Simon") at p. 20, Appendix at A-64; Rothfolk Depo. at p. 78, Appendix A-56. Only 2-3 percent of the ETLs in the district were African-American. Rothfolk Depo at p. 78, Appendix at A-56. This low number is despite Target's stated commitment to have its management staff reflect the diversity of the communities they serve. Rothfolk Depo at p. 79, Appendix at A-56. Simon had only worked with 3 African-American Management employees in his entire career at Target. Simon Depo at p. 47, Appendix at A-68 and A-69. Brown has not worked with any African-American ETL's in her 4-year career at Target. Brown Depo at p. 35, Appendix at A-35.

Riser was supervised at the Apple Valley store by Store Team Lead Chris Simon, and was also under the direction of the business college dean Craig Rothfolk. Both

Simon and Rothfolk took part in the decision eventually to discharge Riser. Rothfolk Depo at p. 37, Appendix at A-48.

While working at the Apple Valley store, Riser worked with three other ETLs Chris Halvorson, Chris Larson, and Desiree Lienhard. Halvorson, Larson, and Lienhard were all responsible for training and evaluating Riser while also working as his peers. Halvorson was assigned as Riser's primary trainer. Halvorson Depo at p. 20, Appendix at A-71. Halvorson believed Riser "did not fit in" as a manager at Target. Halvorson Depo at p. 60, Appendix at A-72.

While working in the Apple Valley store Riser performed the tasks that were assigned to him, (Riser Depo at pp. 36-37, Appendix at A-24 and A-25.) and was not told that he was not meeting expectations or that there were other tasks that he should be performing instead of those to which he had been assigned. Riser Depo at pp. 107, 109, Appendix at A-29 through A-31. Riser was assigned much of the time to the backroom, unloading trucks and helping stage the storeroom area, rather than "pulling" merchandise. Riser Depo at pp. 36-37, Appendix at A-24 and A-25. Apple Valley was one of the busiest stores in the area and Christmas was the busiest time of the year. Rothfolk Depo at p. 63, Appendix at A-55. Halvorson knew Riser was an outside hire with no retail experience, with only one week of training, (Halvorson Depo at p. 20, Appendix at A-71), but did not coach or counsel him regarding any perceived performance problems. Riser Depo at pp. 107, 109, Appendix at A-29 through A-31.

After the Christmas rush was over, and Riser went to complete Business College, he again was assigned to the Apple Valley store as an ETL-IT. Riser Depo at p. 76, Appendix at A-25. One week after returning to the Apple Valley store after completion of his business college, Riser was discharged by Target at the end of his 90-day "learning period." Simon Depo at p. 40, Appendix at A-66. Both Chris Simon and Craig Rothfolk took part in the decision to terminate Riser. Rothfolk Depo at p. 37, Appendix at A-48.

Rothfolk testified that Riser was terminated for lack of leadership. Rothfolk Depo at p. 45, Appendix at A-51. Simon and Rothfolk together met with Riser to inform him of his discharge and stated that he was being discharged based on peer evaluations from his fellow ETLs on the night shift and that the evaluations contained the following information; 1) that Riser never answered the telephone; 2) that Riser did not conduct huddles; 3) that Riser had yelled at an ETL at the Apple Valley store; and 4) that Riser had low productivity. Riser Depo at pp. 94-95, Appendix at A-28.

Although Rothfolk and Simon made the decision to discharge Riser, they admit that they relied upon the peer evaluations of Larson, Halvorson, and Lienhard, and did no independent evaluation or verification of those evaluations. Rothfolk Depo at p. 40, Appendix at A-50; Simon Depo at pp. 43-44, Appendix at A-66 through A-68. During the course of discovery in this matter it was shown that Larson, Halvorson, and Lienhard had initially made allegations of attendance problems against Riser, but documentary evidence and deposition testimony showed that Riser did not have attendance problems and was tardy at most one time, and on that occasion only because there had been an accident on the highway Riser takes to work causing him to be, at most, fifteen minutes late.

While the alleged incident of Riser allegedly yelling at another ETL was mentioned at the termination meeting, both Simon and Rothfolk admit that they did not consider that incident in discharging Riser, the testimony of the ETLs did not support the allegation and Target did not argue that such an alleged confrontation had taken place in seeking summary judgment in this matter. Rothfolk Depo at p. 45, Appendix at A-51; District Court Order, Appendix at A-18. Neither the District Court nor the Court of Appeals mentioned the fact that this allegation was proved false and dropped by Target, even though evidence of shifting reasons for a discharge can be a basis for disbelieving the stated reason for discharge; and

disbelief of the stated reason for discharge can be a basis for a finding of discrimination.

At the time of Riser's discharge Simon and Rothfolk stated only that Riser had low productivity and did not state on what basis that lack of productivity was determined. Rothfolk Depo at p. 45, Appendix at A-51. At the time of summary judgment in this matter Target's counsel contended that the discharge was because of Riser's low pull rates as reflected on a document known as a baffle report which records pulls and error rates of overnight personnel. Target's counsel relied upon baffle reports from the early part of the time that Riser worked for Target to justify the discharge. Admittedly, in the final weeks that Riser worked for Target, his pull rate was equivalent to those of other ETLs. Riser Depo at pp. 11-13, Appendix at A-20 through A-23. No evidence was presented that any other employee, at any level of Target, was ever judged by pull rate alone. In fact, Target employees testified that they did not know of anyone even disciplined because of low pull rates. Lienhard Depo. at pp. 52-53, Appendix at A-44 through A-46.

Moreover, the evidence shows that Target decision makers did not rely on baffle reports and pull rates in their decision to discharge Riser. Simon testified that productivity of ETLs could be measured in a number of ways and that pulls and error percentage was only one of the ways. Simon Depo at p. 34, Appendix at A-64 through A-65. The other ways of measuring productivity are trailer unload time and "push" time. Id. Simon testified that pulls must always be considered along with error percentage, and they are not considered separately. Rothfolk testified that he did not review any baffle reports in deciding to discharge Riser. Rothfolk Depo at p. 40, Appendix at A-50. Halvorson testified that the cartons per hour report and the trailer management tool could also measure ETL-Flow productivity. Halvorson Depo at p. 76, Appendix at A-73 through A-74. Despite the other ways to measure ETL-Flow productivity,

Target produced only baffle reports, and those for only a portion of the time Riser worked for Target.

Riser was never given any coaching or counseling that he was not performing his job appropriately, and never given any opportunity to correct his behavior. Riser Depo at pp. 107, 109, Appendix at A-29 through A-31. Rothfolk, the Dean of the Business College, met with Riser on February 6, 2002, three days before Riser was discharged, and made no mention of any perceived performance problems, because he did not consider that his role. Rothfolk Depo at p. 56, Appendix at A-52 through A-53. Rothfolk did state, however, that someone should have counseled Riser about his perceived performance problems rather than simply discharging him. Rothfolk Depo at p. 62, Appendix at A-54.

Testimony of another ETL hired the same time as Riser and in Riser's business college class established that other ETL-ITs were not given peer evaluations, and that Target routinely coaches and counsels persons, even in their first ninety days of employment before discharging those employees. Brown Depo at pp. 35-36, Appendix at A-35. Even Rothfolk, who recommended Riser's discharge stated that Riser should have received feedback from his trainers if they believed he was not performing appropriately. Rothfolk Depo at p. 62, Appendix at A-54. Lienhard also admitted that Target management personnel usually coach and counsel persons they believe have performance problems even in their first 90 days of employment with Target. Lienhard Depo at p. 40, Appendix at A-44. Brown testified that the performance allegations made against Riser were not consistent with her observations of Riser during Business College. Brown Depo at pp. 52-53, Appendix at A-36 through A-37.

ARGUMENT

I. THE EIGHTH CIRCUIT'S OPINION DOES NOT FOLLOW SUPREME COURT PRECEDENT.

In discrimination cases such as this one, motivation for actions is the key issue. If race is a motivating factor in the discharge, then the jury may find for the Plaintiff. In determining motivation, circumstantial evidence is as probative as direct evidence. *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003). This Court has recognized that employers will rarely admit to their improper motivation in discharging an employee, so their real motivation must be inferred from the circumstances. For that reason, the Court developed the burden shifting analysis of *McDonnel-Douglas Corp. v. Green,* 411 U.S. 792 (1973). Under that analysis, when a Plaintiff has established a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. *McDonnel-Douglas,* 411 U.S. at 802-803. Once the employer has satisfied that burden, the burden shifts back to the Plaintiff to show that the employer's explanation for the alleged discriminatory decision is merely a pretext for discrimination. Plaintiff does that by presenting evidence "showing that the employers proffered explanation is unworthy of credence." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 256 (1981). In that regard, disbelief of the stated reason for discharge permits, although it does not require, a finding that race was the real reason for the discharge, see, e.g., *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000). The decision of the United States Court of Appeals for the Eighth Circuit in this matter does not appropriately follow this Court's precedent in that it does not give sufficient weight to circumstantial evidence nor does it appropriately

recognize that a jury's disbelief of the stated reasons for discharge can support a finding of discrimination.

Both the District Court and the Eighth Circuit Court of Appeals in this case accept uncritically Target's purported legitimate nondiscriminatory reason for discharge of Riser as stated by Target's counsel in oral argument. Based upon its acceptance of those stated reasons, both Courts find that Riser cannot show that he performed adequately on those criteria, and that he therefore cannot survive summary judgment. Both Courts, however, ignore the fact that there is no evidence, documentary or testimonial, that productivity, as measured by pull rates, was actually the criterion applied by Target to Riser in this case. The only person who has ever stated that pull rates were the main criterion upon which this discharge is based is Target's counsel. Arguments of counsel are not facts. The facts in this matter show that productivity is measured by a number of criteria that must be balanced, not a simple comparison of one criterion out of the many criteria upon which productivity are measured. An employer's discharge of an employee must be judged upon the criteria actually applied at the time of the discharge, not based on creative arguments developed by counsel through the discovery process.

Target's purported legitimate, nondiscriminatory reasons for discharge in this case are as stated by Target representatives at the time of the discharge. As stated at that time, productivity and lack of leadership were the purported reasons for the discharge. No reference to pull reports was made, and no such reports were reviewed in making the decision to discharge Riser. The Eighth Circuit's emphasis on the pull rates, based upon Target's counsel's emphasis on those rates, is inappropriate because that was not the reason in fact relied upon by Target in the discharge.

Moreover, at the pretext stage of a discrimination case, the Plaintiff must show that the "employer's proffered explanation is unworthy of credence." *Burdine,* 450 U.S. at

256. Riser can show that the reason relied upon by Target in summary judgment in this matter is unworthy of credence in several ways. In this case, the evidence in the light most favorable to Riser shows that the reasons stated at the time of summary judgment are not in fact the reasons relied upon at the time of discharge. There is also evidence that the reasons stated at the time of discharge were not criteria upon which any other ETLs or ETL-ITs were judged. The evidence in the light most favorable to Riser, also shows that at the time of his discharge, his productivity was equal to those of other ETLs. Evidence that the criteria relied upon at the summary judgment motion stage was not the criteria relied upon at discharge stage, and evidence that the criteria purportedly applied to Riser was not applied to any other ETLs or ETL-ITs is all evidence tending to show that the employer's proffered explanation is unworthy of credence. If an employer purports to rely upon criteria with one individual that it does not rely upon with respect to any other individual, that raises a question as to whether that criterion is a credible reason for the discharge. By focusing on whether Riser had in fact performed equally with other experienced ETLs with respect to the stated criteria, the Eighth Circuit takes away from Riser his right to show that the stated reason itself is unworthy of credence because it was not applied to other employees.

In this case, a jury is entitled to hear that Riser was discharged based on the peer evaluations of three persons who had limited experience with African-Americans, one of whom testified that Riser just "did not fit in" and that many of the statements made by these peer evaluators were later found to be demonstrably false. For instance, initially these three witnesses stated that Riser was frequently tardy, at one point saying that he was tardy up to half of the time. See Defendant's Answer to Interrogatory No. 9, Appendix at A-58 through A-62. When pressed, however, it was shown that Riser was late at most once and then for an easily explained

reason, and Target did not rely on alleged tardiness in its motion for summary judgment, Appendix at A-18. The initial claims of Riser yelling at another ETL were also dropped when the objective evidence differed from the initial stories of the peer evaluators. A claim that Riser had refused to conduct a huddle on January 4, 2002, was also dropped when documentary evidence showed that Riser was not even scheduled to work that day. Lienhard Depo at p. 34, Appendix at A-43. A jury is entitled to hear this conflicting and shifting testimony of Riser's peer evaluators, on whose evaluations his discharge depended, to determine the credibility of the stated reasons for his discharge. Riser was the only African-American working in a similar position for Target at the time and a jury, disbelieving the stated reason for discharge, would be entitled to find that race was a motivating factor.

The Eighth Circuit incorrectly characterizes Riser's argument to be that Target should have more clearly articulated what was required of him. The Eighth Circuit observes that failure to inform an employee of what is expected of him is not evidence of discriminatory animus. While that observation may be true, failure to inform your only African-American employee of what is expected of him, when Caucasian employees are informed of what is expected of them, is evidence of discriminatory animus.

This is not a case in which Riser states that he should have been given more direction before being discharged. This is a case in which Riser alleges that had he been Caucasian he would have been given coaching and counseling before being discharged. Testimony of other ETLs shows that Target routinely coaches and counsels persons before discharging them even within the first ninety days of employment. A jury is entitled to hear this evidence to determine whether a company that normally coaches and counsels employees before discharging them would fail to do so with its only African-American ETL-IT just as a matter of

coincidence or because of the race of that African-American employee. Not allowing a jury to hear this evidence does not respect this Court's precedent with respect to the effect of disbelief of the employer's stated reason for discharge.

The Court of Appeals decision in this matter sets a dangerous precedent. Employees are always going to differ on some criteria. In this case, there is no evidence that any other employee was ever judged by the same criteria allegedly applied to Riser. Riser cannot show that he had higher pulls than other ETLs in the first five weeks that he worked for Target, because he objectively did not. What Riser can show, however, is that one of the persons making the decision to terminate him stated that productivity cannot be measured by pulls alone, and neither of the decision-makers even reviewed his pull numbers before discharging him; yet counsel for Target relies on pulls exclusively as the measure of productivity upon which Target based its decision. Target's counsel goes so far as to focus the Court only on the first five weeks pull reports, because later weeks show Riser performing at a level equivalent to other ETLs.

If an employer is allowed to search its records to find some criterion upon which an employee differs from other employees and simply state that criterion was the basis for the discharge, without any objective evidence that that criterion has ever been considered important in evaluating any employee, then employers will be allowed to discriminate against their employees contrary to congressional interest in enacting Title VII and Section 1981. There will always be some criterion by which a discrimination Plaintiff differs from other employees. If an employer can simply present evidence of this difference, without any requirement that the employers provide any objective evidence that that criterion has ever been considered important by that employer, then employer will face no practical restriction on their employment decisions. Congress enacted Title VII and Section 1981 to combat racial discrimination in the

workplace. This Court should not allow decisions such as the Eighth Circuit's decision in this case to eviscerate those protections. Plaintiffs must be allowed to present evidence of pretext that shows that the criteria relied upon in court to justify a discharge are not criteria applied to any other person. The fact that the relied upon criteria have not been applied to others may lead a jury to conclude that it is unlikely that the criteria were in fact applied in this case.

This Court has recognized that employers are generally too sophisticated to admit that they are discriminating against a person on the basis of race or any other statutorily proscribed criterion. This Court has thus recognized that circumstantial evidence is as probative as direct evidence in determining whether discrimination has occurred. This Court has also recognized that disbelief of the stated reason for discharge permits a finding of discrimination. Disbelief of the stated reason for discharge has to encompass a disbelief that the stated criteria were in fact the criteria applied to this individual as well as disbelief that the Plaintiff was actually deficient in those criteria. Unless employers are required to present some objective evidence that the criterion upon which the Plaintiff was allegedly judged was in fact a criterion upon which employees of the Defendant were judged, the burden on Plaintiffs to prove a case of discrimination would be too great.

A system of justice is judged not by its outcomes, but by its process. The eighth circuit's decision does not give sufficient respect to the jury's role in this process. A jury must be allowed to hear evidence that the stated criteria for discharge were not applied to any other employees in determining whether it is likely that that criterion was in fact applied to the Plaintiff. If the jury determines that it is more likely than not that the stated criteria were not the criteria upon which Plaintiff was actually discharged, then the jury

would be entitled to find that race was a motivating factor in the discharge.

In this case, Target relies upon a criterion objectively shown not to be a criterion applied to any other individual, and discharged Riser on that basis without following a procedure that it routinely followed with respect to other employees. A jury must be allowed to hear these facts and determine whether an employer who acts differently with respect to this employee than it has with respect to any of its other employees did so on the basis of the one criterion for which this employee differs from those other employees; his race.

II. THE DECISION OF THE EIGHTH CIRCUIT IN THIS MATTER CREATES A CONFLICT BETWEEN THE CIRCUITS.

The narrow view of pretext, and the blind reliance on the employer's stated reason for discharge evidenced in the Eighth Circuit's decision in this matter, puts the Eighth Circuit in conflict with decisions of other Circuits, such as *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003). In *Wexler*, the Court noted that "A Court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the *prima facie* case. To do so would bypass the burden shifting analysis and deprive the Plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination." *Wexler*, 317 F. 3d 574. The Court noted that this was consistent with other Sixth Circuit precedent. See, *Cline v. Catholic Diocese of Toledo*, 206 F. 3d 651, 660-661 (6th Cir. 2000), quoted in the *Wexler* decision as stating, "When assessing whether a Plaintiff has met her employer's legitimate expectations at the *prima facie* stage of a termination case, a Court must examine Plaintiff's evidence independent of the nondiscriminatory reason produced by the defense as its reason for terminating

Plaintiff." *Wexler*, 317 F. 3d 574-575. In this case, the District Court had granted summary judgment on the basis that Plaintiff could not prove a *prima facie* case because Plaintiff could not show that he performed equally to other employees on the criteria alleged by Target to have been applied to him. While the Eighth Circuit assumes that Riser has established a *prima facie* case, it does not reverse the District Court's *prima facie* case decision. This Court should grant *certiorari* in this matter, in addition to the other bases set forth in this petition, to clarify that it is inappropriate to find that a Plaintiff does not meet his *prima facie* case solely based upon his performance with respect to the criteria alleged to have been applied to him in the employer's stated legitimate nondiscriminatory reason.

With respect to the pretext issues that are actually addressed in the Eighth Circuit Opinion, the *Wexler* Court states,

> A Plaintiff can refute the legitimate, nondiscriminatory reason that an employer offers to justify an adverse employment action "by showing that the proffered reason (1) has no basis, (2) do not actually motivate the Defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct."

Wexler, 317 F. 2d576 (quoting *Dews v. A.B. Dick Company*, 231 F. 3d 1016, 1021 (6th Cir. 2000). The Sixth Circuit reversed the District Court's grant of summary judgment stating that "The District Court ignored inferences in favor of Wexler that can be drawn from the evidence about whether it was reasonable to blame him for the Morse Road's Stores declining sales. Wexler produced evidence indicating that White's was aware that the decline in revenue was not his fault." *Wexler*, 317 F. 3d 577. Other Circuits also follow the Sixth Circuit Approach. See, e.g., *Vessels v. Atlanta Independent School System*, 408 F. 3d 263 (11th Cir. 2005);

Fuentes v. Perskie, 32 F. 3d 379 (3rd Cir. 1994); *Morgan v. Hilti, Inc.*, 108 F. 3d 1319 (10th Cir. 1997); *Chuang v. University of California Davis, Bd. of Trustees*, 225 F. 3d 1115 (9th Cir. 2000).

In this case, applying the *Wexler* analysis, the result would be completely different. Riser presented evidence that the criteria alleged by counsel at argument to have been applied by Target were not in fact the criteria applied at the time of discharge, presented evidence that those criteria had not been applied to any other employees and also presented evidence that there were reasons why the areas in which he was judged deficient were not his fault. The evidence shows that Riser was assigned to the back of the store, unloading trucks and staging materials in the stockroom for placement on the floor, rather than pulling merchandise for placement on the floors. The evidence shows that Riser was assigned by his trainer to those tasks. There was evidence that Riser was not given any coaching or counseling to alert him that he would be judged upon pulls, not upon his performance unloading trucks and arranging the stockroom area. Riser also presented evidence that other employees were given coaching and counseling when performance issues were perceived within the first 90 days of their performance. Riser thus presented evidence that the stated criteria did not actually motivate the Defendant's challenged conduct, and that they were insufficient to warrant the challenged conduct. Under existing Sixth Circuit precedent, the District Court decision in this case would have been reversed and trial ordered to determine whether Target in fact relied upon the criteria stated in discharging Riser or rather relied upon his race. This Court should, therefore, grant *certiorari* in this case in order to resolve the conflicts between the circuits with respect to the amount of evidence necessary for Plaintiff to reach a jury with respect to issues of pretext.

CONCLUSION

The decision of the Eighth Circuit in this matter fails to follow well-established Supreme Court precedents with respect the shifting burdens in an employment case. The case creates a greater burden for Plaintiffs than what was intended by Congress in the enactment of Title VII and Section 1981 and recognized in this Court in numerous decisions. The case also presents a conflict between the Circuits as to the amount of evidence necessary for a Plaintiff to reach a jury on issues of pretext. For those reasons, this Court should grant *certiorari* to review the decision of the Eighth Circuit in this case. Plaintiff, Billeigh Riser, therefore respectfully requests this Court to grant his Petition for Writ of Certiorari to determine whether a discrimination Plaintiff is entitled to survive summary judgment when he shows that the criterion allegedly applied to him were not in fact applied to any other employees of Defendant.

Respectfully submitted, December 21, 2006

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-4147

Billeigh H. Riser, Jr.,

Appellant,

v.

Target Corporation,

Appellee.

Appeal from the United States District Court for the District of Minnesota

Submitted: May 19, 2006
Filed: August 17, 2006

Before MURPHY, BEAM, BENTON, Circuit Judges.

BEAM, Circuit Judge.

Billeigh Riser, Jr., a black male, brought suit against his former employer, Target Corporation, alleging race discrimination in violation of Title VII of the Civil Rights Act of 1991, 42 U.S.C. ß 2000e et seq., 42 U.S.C. ß 1981, and the Minnesota Human Rights Act (MHRA). The district court[1] granted Target's motion for summary judgment, determining that Riser was unable to demonstrate that he met Target's legitimate expectations of employment or that he was terminated in circumstances that give rise to an inference of unlawful discrimination. He was thus unable to establish a prima facie case under the relevant statutes. The court further

[1] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

held that even if Riser could set forth a prima facie case, he could not show that Target's legitimate and nondiscriminatory reasons for terminating him were pretext.

Riser appeals. We affirm.

I. BACKGROUND

In 2001, Target hired Riser as an Executive Team Lead In Training (ETLIT). Riser worked the overnight shift at Target's Apple Valley location. He completed one week of business training at a different Target location along with three other new-hires before he began his on-the-job training in Apple Valley. His duties as an overnight ETL at Target included unloading merchandise trucks and shelving the items in the warehouse, facilitating the stocking of store shelves by hourly employees, reorganizing the stock room, and stocking store shelves himself.

Three other ETLs worked the overnight shift with Riser in Apple Valley. All three of the other ETLs were white. Indeed, Riser was the only black ETL working any shift at the Apple Valley store. These three co-workers, along with Craig Rothfolk, the director of Riser's business training program, and Chris Simon, the store manager (STL) at the Apple Valley location, all monitored Riser's progress during Riser's initial ninety-day probationary period. At the end of Riser's probationary period, Target fired Riser because he was doing a poor job. Riser had a low number of "pulls" (a number that reflects pieces of merchandise pulled from the stockroom to replenish store shelves), failed to conduct "huddles" (the nightly staff meeting), and did not answer overhead phone calls. Through deposition testimony, Target claims that Riser had the lowest "pulls" of any ETL-IT they recalled.

Riser, on the other hand, claims that he was actually fired because he was black and that Target never gave him any supervisory feedback to alert him to the fact that he was failing to meet certain expectations. He claims that because they failed to tell him exactly what to do, he cannot be held responsible for failing to perform at a certain level.

On appeal, Riser argues that the district court blindly accepted Target's assertions that Riser was failing to meet its standards without producing any objective evidence of the alleged standards that Riser failed to meet. He claims the district court failed to apply the appropriate summary judgment standard when it viewed the evidence.

II. DISCUSSION

This court reviews the grant of summary judgment de novo, viewing the facts most favorably to the nonmoving party. Canady v. Wal-Mart Stores, Inc., 440 F.3d 1031, 1034 (8th Cir. 2006). "[S]ummary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. "We must affirm the grant of summary judgment on a claim if any essential element of [Riser's] prima facie case is not supported by specific facts sufficient to raise a genuine issue for trial." Turner v. Gonzales, 421 F.3d 688, 694 (8th Cir. 2005).

Title VII prohibits discrimination against an employee with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex or national origin. See 42 U.S.C. ß 2000e-2(a)(1). Because Riser does not present direct evidence of discrimination, this court analyzes the case under the burden-shifting standard in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Under McDonnell Douglas, Riser has the initial burden of establishing a prima facie case of discrimination by showing that: 1) he is a member of a protected group; 2) he was meeting Target's legitimate expectations; 3) he was discharged; and 4) the discharge occurred in circumstances that give rise to an inference of unlawful discrimination.[2] Cherry v. Ritenour Sch. Dist., 361 F.3d 474, 478 (8th Cir. 2004). If Riser establishes a prima facie case, Target must articulate a legitimate, nondiscriminatory reason for Riser's discharge. Id. Riser must then demonstrate that the nondiscriminatory reason offered by Target was really a pretext for racial discrimination. Id.

Riser claims that the district court erred in granting summary judgment because it did not have any performance standards on which to base its decision and it took Target's version of the facts as true, contrary to the standard required at this stage of the litigation. Riser fails on appeal, however, because even if we presume he established a prima facie case, he has shown nothing to establish that Target was likely motivated by a discriminatory reason or that Target's explanation was unworthy of credence. Rose-Maston v. NME Hosps., Inc., 133 F.3d 1104, 1108 (8th Cir. 1998).

Stated simply, Riser argues that the reasons Target gives for his failings as an employee were not expectations clearly or specifically articulated to him during his employment and the real reason he was fired was because he was black. But generally it is not this court's disposition to pass judgment on the particular training programs and management styles of employers. Even if more direction would have been preferable, Target's failure to inform Riser of what was expected of him is not evidence of discriminatory animus. Id.

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[2] We apply the same standard for both Title VII and MHRA claims. Pope v. ESA Servs., Inc., 406 F.3d 1001, 1006 (8th Cir. 2005).

The parties have spent a great deal of time in briefing and at oral argument, disagreeing about whether Riser established a prima facie case under the McDonnell Douglas burden-shifting framework, especially whether it is Riser's burden at the second step to prove that he was merely "qualified for the job" or whether he ~~met the~~ more (seemingly) onerous burden of proving that he "met Target's legitimate expectations." See, e.g., Box v. Principi, 442 F.3d 692, 696 (8th Cir. 2006) (articulating plaintiff's burden at step two as "she was meeting the legitimate expectations of her employer"); Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 850 (8th Cir. 2005) (articulating plaintiff's burden at step two as "she was qualified for her position"). However, even assuming that there is a distinction with a difference between the two articulations, and the "qualified for the job" articulation at the second step is indeed a less onerous standard, as Riser contends, we need not devote extensive analysis to the subject here. Rather, we must see the forest through the trees. Id. at 856 (Colloton, J. concurring).

"The prima facie case method established in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic," and "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715 (1983) (internal quotation omitted). Thus, we need not indulge the parties' disputes about which material facts are in dispute or whether Riser met his burden in establishing a prima facie case under McDonnell Douglas regardless of the "threshold" we have set for such proof. Rodgers, 417 F.3d at 851-53. Even assuming all of the disputed facts are material, and that Riser has established a prima facie case, Riser falls short. Riser has not generated a genuine issue for trial on the "ultimate question of

discrimination vel non," U.S. Postal, 460 U.S. at 714, and that is enough to resolve this appeal.

Target asserts that it discharged Riser because of his inadequate performance at the Apple Valley store. Specifically, its legitimate nondiscriminatory reasons for Riser's discharge were that he failed to conduct a sufficient number of huddles, failed to answer the phone, and was deficient in the number of pulls he completed. Riser challenges each of the reasons given by Target, pointing out that even if the productivity measures of his performance provided by Target are accurate and equally applied to all employees, which he does not concede,[3] these deficiencies were not communicated to him on any evaluation form nor did Target convey these specific standards of performance to him by any other means during his employment.

Basically, he claims that Target did not articulate its expectations specifically enough to him. He rotely performed the work he was directed to do and he claims that was sufficient to show that he should have been retained.

However, the fact that Target might not have specifically set forth each task it was using to measure the competency demonstrated by Riser as an ETL-IT, does not carry the day for Riser in creating a reasonable inference that race was a determinative factor in his termination. See Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1334 (8th Cir. 1996). Again,

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[3] As to his low number of pulls, Riser asserts that he worked a majority of his time in the shipping area unloading cargo from delivery trucks and when he did ultimately pull items, they were large items such as bags of dog food or furniture that would result in a lower pull number. Riser produced evidence that he had in fact performed "at least" four huddles during his ninety-day learning period and claims that Target never stated its expectations to Riser regarding the number of huddles it expected him to perform.

managers are expected to demonstrate a high level of independence and initiative and although Riser may have felt that Target's approach was inappropriate, and that more specificity would have been preferable, an employer's "failure to inform an employee of what is expected of [him] is not evidence of discriminatory animus." Rose-Maston, 133 F.3d at 1108. While Riser may have some concerns about Target's management style, he does not have a Title VII claim. See Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995) ("[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.")

A second avenue Riser traverses in an attempt to prove pretext is to demonstrate that he was treated less favorably than similarly situated employees outside of his protected group. He claims that similarly situated employees were not held to the same standard. Here, though, Riser also falls short because he has failed to show that he was similarly situated to any of these white employees. He must show that he and the employees outside of his protected group were similarly situated in all relevant respects. Rodgers, 417 F.3d at 853. "We have equated the phrase 'similarly situated in all relevant respects' with the statement that '[e]mployees are similarly situated when they are involved in or accused of the same offense and are disciplined in different ways.'" Id. at 856 (Colloton, J., concurring) (quoting Wheeler v. Aventis Pharm., 360 F.3d 853, 858 (8th Cir. 2004)) (alteration in original).

Riser fails to demonstrate that the comparators were similarly situated in all relevant respects. In fact, the others are quite dissimilar. Regardless of Target's failure to produce particular

productivity reports on him for certain periods during Riser's employment as well as those on the employees discussed by Riser, including his fellow ETLs at Apple Valley and the ETL-ITs from his business college class working in other locations, the duties of those individuals varied from his. As to the other ETL-ITs, each was working at other Target locations, working different shifts, with different management and job duties. And it suffices to say that the other ETLs at Apple Valley were not similarly situated because they were not trainees, were not cited for the same shortcomings as Riser and would have been held to different standards. Additionally, Elizabeth Brown, an ETL-IT discussed by Riser, worked in an entirely different store in a different position on a different shift.

At any rate, Target did produce evidence showing that Riser's productivity was lacking in particular, measurable areas. Riser has not "eliminate[d] the most common nondiscriminatory reasons" for Target's action, and the evidence does not justify the legal presumption that Target's decision to terminate Riser was "more likely than not based on the consideration of impermissible factors." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

III. CONCLUSION

For the reasons stated herein, we affirm.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Billeigh H. Riser, Jr.,

Plaintiff,

v.

Civ. No. 03-6094 (JNE/JSM)
ORDER

Target Corporation,

Defendant.

Richard Williams, Esq., and Angela M. Ring, Esq., Williams & Iversen, P.A., appeared for Plaintiff Billeigh H. Riser, Jr.

Joseph G. Schmitt, Esq., Halleland Lewis Nilan & Johnson P.A., appeared for Defendant Target Corporation.

Billeigh H. Riser, Jr., brought this action against his former employer, Target Corporation, after Target allegedly discriminated against him on the basis of his race in violation of 42 U.S.C. § 1981 (2000), Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2000), and the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.41 (2004), when it terminated his employment. The case is before the Court on Target's Motion for Summary Judgment. For the reasons set forth below, the Court grants Target's motion.

I. BACKGROUND

Target is a national retailer of consumer goods. It divides its store operations into four regions, divides each region into groups, and divides each group into districts. Each district includes several stores. A Store Team Lead

(STL) manages a store and the store's Executive Team Leads (ETLs). The ETLs manage various areas of the store and supervise the store's hourly employees.

Target hired Riser, an African American, as an Executive Team Lead in Training (ETLIT) on November 11, 2001. Initially, Riser and three other ETL-ITs attended training. Ordinarily, their training would have lasted several weeks. Due to the approaching holiday season, their training lasted one week. After training, Target assigned the ETL-ITs to stores. Riser was assigned to a store in Apple Valley, Minnesota, as an ETL-IT on the overnight shift.

At the Apple Valley store, Riser joined three ETLs on the overnight shift: Chris Halvorson, Chris Larson, and Desiree Lienhard. Generally, two of the four executives would work each night. As an ETL or ETL-IT on the overnight shift, Halvorson, Larson, Lienhard, and Riser managed the store's restocking. Their specific responsibilities included: (1) unloading trucks; (2) moving product to the store floor; (3) restocking shelves; (4) responding to telephone calls; (5) pulling product from storage; and (6) conducting nightly meetings with overnight employees. Riser worked in Apple Valley until mid-January 2002, when he returned to his training.

While Riser continued his training, Craig Rothfolk, the director of the training program, and Chris Simon, the STL at the Apple Valley store, collected information about Riser's performance. On February 9, 2002, Rothfolk and Simon met with Riser and informed him that Target had decided not to extend his employment beyond his 90-day probationary period. His employment terminated that same day.

The next month, Riser filed a charge of discrimination

with the Equal Employment Opportunity Commission. He received notice of his right to sue in August 2003 and commenced this action in November 2003. Target now moves for summary judgment.

II. DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion," and must identify "those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden, Rule 56(e) requires the nonmoving party to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In determining whether summary judgment is appropriate, a court must look at the record and any inferences to be drawn from it in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The parties agree that the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to determine whether Target is entitled to summary judgment. Under *McDonnell Douglas*, Riser must first establish a prima facie case of discrimination by showing that: (1) he is a member of a protected group; (2) he was meeting Target's legitimate expectations; (3) he was discharged; and (4) the discharge occurred in circumstances that give rise to an inference of unlawful discrimination. *See*

Johnson v. AT&T Corp., 422 F.3d 756, 761 (8th Cir. 2005). If Riser establishes a prima facie case, Target must articulate a legitimate, nondiscriminatory reason for Riser's discharge. *See Cherry v. Ritenour Sch. Dist.*, 361 F.3d 474, 478 (8th Cir. 2004). Riser must then demonstrate that the nondiscriminatory reason offered by Target was really a pretext for racial discrimination. *See Johnson*, 422 F.3d at 762. Target first argues that it is entitled to summary judgment because Riser cannot establish a prima facie case of racial discrimination. Specifically, Target asserts that Riser was not meeting its legitimate expectations and that Riser's discharge did not occur in circumstances that give rise to an inference of unlawful discrimination. The Court considers each argument in turn.

To establish his prima facie case, Riser must demonstrate that he was actually performing his job at a level that met Target's legitimate expectations. *See Whitley v. Peer Review Sys., Inc.*, 221 F.3d 1053, 1055 (8th Cir. 2000). That an employee meets some expectations does not mean he meets the standard if he fails to meet other significant expectations. *Calder v. TCI Cablevision of Mo., Inc.*, 298 F.3d 723, 729 (8th Cir. 2002). According to Target, Riser failed to meet its legitimate expectations as to performing pulls, leading nightly meetings, and responding to telephone calls.[1]

Target asserts that Riser's performance of pulls did not meet its expectations. To measure employee productivity, Target tracks the number of pulls an employee performs. To restock a store, employees locate product in the store's stockroom, pull the product from the stockroom's shelves, and place the product in an area where it will be moved to the store floor. According to the deposition testimony of Halvorson, Larson, Lienhard, and Simon, Riser's pull numbers were the lowest they recalled for an ETL-IT. Target

also retained productivity reports of the employees who worked at the Apple Valley store when Riser worked there. The reports reveal that Riser performed far fewer pulls than the three ETLs. For the weeks ending November 24, 2001, December 1, 2001, December 8, 2001, December 15, 2001, December 22, 2001, December 29, 2001, and January 5, 2002, Riser performed 169, 283, 183, 82, 529, 723, and 207 pulls, respectively; Halvorson performed 717, 1148, 972, 1075, 1270, 704, and 159 pulls, respectively; Lienhard performed 868, 1389, 1795, 1719, 1509, 906, and 246 pulls, respectively; and Larson performed 1113, 933, 1229, 2019, 1853, 935, and 385 pulls, respectively.

Notwithstanding the relatively low number of pulls he performed, Riser asserts that he was meeting Target's legitimate expectations. Riser argues he had less time to perform pulls because he unloaded trucks and organized the back room while Halvorson, Larson, and Lienhard performed pulls. The record does not support his argument. First, Riser testified at this deposition that he could not state with certainty how much time Halvorson, Larson, and Lienhard had to perform pulls. Second, trucks were unloaded before products were pulled. Third, Riser acknowledged that he could have delegated the tasks he performed in the back room. Finally, like Riser, the ETLs also unloaded trucks.

Riser next argues that Target should not have expected him to have comparable pull numbers because he was a new employee. He notes that his pull numbers were similar to those of Halvorson, Larson, and Lienhard during the weeks ending December 29, 2001, and January 5, 2002. The Court rejects this argument because "the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve

intentional discrimination." *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995).

Finally, Riser asserts that the Court should infer that he was performing at a level comparable to other ETL-ITs at the beginning of their training. The Court should draw this inference, Riser argues, because Target did not retain reports on other employees' productivity.

As discussed above, Target retained productivity reports for the employees who worked at the Apple Valley store when Riser worked there. The reports indicate that Riser performed far fewer pulls than Halvorson, Larson, and Lienhard. Riser does not explain the relevance of productivity reports for employees at stores other than the one where he worked and at times other than when he worked. *See Williams v. Ford Motor Co.*, 14 F.3d 1305, 1309 n.2 (8th Cir. 1994). He worked at the largest store in Minnesota as measured by sales and at the busiest time of the year. There is no indication that Target did not retain productivity reports for employees at stores other than Apple Valley and for periods other than when Riser worked at Target in an effort to suppress evidence of whether he met its legitimate expectations. Accordingly, the adverse inference Riser seeks is not warranted. *See Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 747 (8th Cir. 2004) (requiring "some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth in order to impose the sanction of an adverse inference instruction"). Viewing the record in the light most favorable to Riser, no reasonable finder of fact could conclude that he met Target's legitimate expectations as to performing pulls.

Target also maintains that Riser failed to meet its legitimate expectations as to leading nightly meetings. During the overnight shift, Target expected one of the

executives to lead a meeting with the employees. Because Riser worked at the Apple Valley store for approximately seven weeks and there were four executives—Riser, Halvorson, Larson, and Lienhard—Riser should have conducted approximately twelve nightly meetings. Riser conducted four. Halvorson, Larson, Lienhard, and Simon could not recall an ETL-IT who conducted so few nightly meetings. Viewing the record in the light most favorable to Riser, no reasonable finder of fact could conclude that Riser met Target's legitimate expectations as to leading nightly meetings.

Target next contends that Riser failed to meet its legitimate expectations as to responding to telephone calls. On the overnight shift, the Apple Valley store received approximately five to ten telephone calls per night. As an ETL-IT or an ETL, Riser, Halvorson, Larson, and Lienhard were responsible for answering the calls. At his deposition, Riser acknowledged that he did not answer telephone calls. According to Riser, Lienhard answered all calls of which he was aware because she liked to do so. This explanation does no account for his failure to answer telephone calls when he did not work with Lienhard. Riser also asserts that he could not respond to telephone calls when he was unloading trucks. This explanation fails to explain why Riser did not answer calls after trucks were unloaded. Viewing the record in the light most favorable to Riser, no reasonable finder of fact could conclude that Riser met Target's legitimate expectations regarding responding to telephone calls.

In short, Riser failed to demonstrate that he was actually performing his job at a level that met Target's legitimate expectations. Consequently, Riser cannot establish his prima facie case and Target is entitled to summary judgment.

Target also asserts that Riser cannot establish that his discharge occurred in circumstances that give rise to an inference of unlawful discrimination. Riser asserts that inference of unlawful discrimination is warranted because similarly-situated employees outside of his protected group were treated differently. *See Wheeler v. Aventis Pharms.*, 360 F.3d 853, 857 (8th Cir. 2004). The record does not support Riser's assertion. In this case, the only employees who might be similarly situated to Riser are Halvorson, Larson, and Lienhard. Employees who worked at other stores, at other times, or in different positions are not similarly situated to Riser. *See Williams*, 14 F.3d at 1309 n.2. As set forth above, Riser's performance was demonstrably less productive than that of Halvorson, Larson, and Lienhard. Consequently, Riser cannot establish an inference of unlawful discrimination based on differential treatment of similarly-situated employees.

Next, Riser asserts that an inference of unlawful discrimination is warranted because he did not receive sufficient guidance as to Target's performance expectations. "[A]n employer's failure to inform an employee of what is expected of her is not evidence of discriminatory animus." *Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1108 (8th Cir. 1998). Accordingly, Target's alleged failure to give Riser sufficient guidance does not give rise to an inference of unlawful discrimination.

Riser also points to a comment Halvorson made at his deposition as evidence that warrants an inference of unlawful discrimination. At his deposition, Halvorson was asked: "Did you feel . . . that [Riser] just didn't really fit in as a manager?" He responded, "Yes." This exchange occurred at the end of a series of questions about Riser's productivity. As set forth above, Riser's pull numbers were far lower than those of Halvorson, Larson, and Lienhard. In light of Riser's

poor productivity, Halvorson's opinion that Riser did not fit in as a manager at Target does not give rise to inference of unlawful discrimination.

Finally, Riser asserts that an inference of unlawful discrimination is warranted because

(1) he was the only African American hired as an ETL-IT in 2001 and 2002 in the district that includes Apple Valley;

(2) he was the only African American in his training class and the only one who did not complete the probationary period; and

(3) he was the only ETL-IT terminated for reasons other than gross misconduct in 2001 and 2002. Riser has not offered any evidence to support his contention that his status as the sole African American ETL-IT hired in the relevant district and subsequent termination evinces Target's racial discrimination. In addition, Riser contends that Target's characterization of his performance reflects racial stereotypes and, therefore, gives rise to an inference of unlawful discrimination. This argument is an unsupported rhetorical attack. "Evidence, not contentions, avoids summary judgment." *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 809 (8th Cir. 2003).

Because Riser cannot establish that he was actually performing his job at a level that met Target's legitimate expectations or that he was terminated in circumstances that give rise to an inference of unlawful discrimination, he cannot establish a prima facie case of racial discrimination. Consequently, Target is entitled to summary judgment.

Even if Riser had established his prima facie case, Target has proffered legitimate, nondiscriminatory reasons for Riser's discharge. Specifically, Target asserts that it discharged Riser because of his inadequate performance at the

Apple Valley store. There is no evidence in the record that Target's proffered reason for Riser's discharge is a pretext for racial discrimination. Accordingly, the Court grants Target's motion for summary judgment.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Target's Motion for Summary Judgment [Docket No. 12] is GRANTED.

2. Riser's Complaint [Docket No. 1] is DISMISSED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 11, 2005

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

Although Target identified other alleged deficiencies in Riser's performance, namely tardiness and an inappropriate confrontation with Larson, Target did not rely on these deficiencies to demonstrate that Riser was not meeting its legitimate expectations. (Def.'s Mem. Supp. Summ. J. 11-14.) Accordingly, the Court declines to consider them here.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-4147

Billeigh H. Riser, Jr.,

Appellant,

vs.

Order Denying Petition for Rehearing and for Rehearing En Banc

Target Corporation,

Appellee.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken took no part in the consideration or decision of this matter.

(5128-010199)

September 22, 2006

Order Entered at the Direction of the Court

s/
Clerk, U.S. Court of Appeals, Eighth Circuit

VIA TRANSMISSION

United States Court of Appeals
for the Eighth Circuit Circuit Clerks Office
Voice: 314-244-2400 Fax..: 314-244-2780

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Billeigh H. Riser, Jr.,

Plaintiff,

vs. Case No. 03-6094 JNE/JSM

Target Corporation,

Defendant.

The Deposition of BILLEIGH HOAGE RISER, JR., taken pursuant to Notice of Taking Deposition, taken before Barbara F. Schoenthaler, a Notary Public in and for the County of Washington, State of Minnesota, taken on the 21st day of October, 2004, at 600 Pillsbury Center South, 220 South Sixth Street, Minneapolis, Minnesota, commencing at approximately 9:10 a.m.

***

being compared to experienced -- I wasn't comparing that. I was showing that I was -- I did have high productivity as well as my error percentage was higher than my fellow peers.

Q. And I take it you mean lower.

A. Lower, I'm sorry.

Q. The next sentence says here "I pulled more than my peers and had a smaller error rate." Do you see that statement?

A. Yes, right here.

Q. Okay. Now, your peers were Chris Larson, Chris Halvorson, and Desiree Schwartz; right?

A. Correct.

Q. Those were the other ETL's in the Apple Valley store?

A. With a new ETL coming in about January which was Jess, but yes, those were.

Q. But when you say "my peers," you're referring to those three people?

A. Yes.

Q. And so what you're telling Ms. Li is that you pulled more than Mr. Larson, Mr. Halvorson, and Ms. Schwartz and you had a smaller error rate than they did?

A. Depending on what time I was looking at because what I did before, you know, I was let go I got a report because I wanted to see where my productivity or just monitor my own progress, so I did -- I did print out a baffle report for myself and so I just used that, and I looked at the window and I noticed that that time window I produced more pulls as well as my error percentage was lower than my other peers.

Q. So you were suggesting to Ms. Li that if she looked at the baffle productivity reports, it would demonstrate that you were more productive and more accurate than your peers?

A. I wouldn't say -- I still won't say more, but I was accurate as well as productivity was high for myself.

Q. Okay. Well, did you tell Ms. Li that you pulled more than your peers and had a smaller error rate or something like that? I don't know if it was word for word.

A. Honestly I can't recall that conversation, I mean, word for word. I did mention that for them, as in Target, to let me go, they said I had low productivity, and I show her the baffle report, and this is just a snapshot of one week's worth of work, so I was letting her know.

(At this time Riser Deposition Exhibit Number 2 was marked for identification by the Court Reporter.)

BY MR. SCHMITT:

Q. Showing you what's been marked as Exhibit 2, these appear to be more notes from Ms. Li. They're dated September 10, and although the copy cuts it off, I think it's September 10 of 2002. And she's got a conversation here with initials on the left side of the page, "BR," which I take it is yourself, and HL, which is Ms. Li. Do you recall meeting with Ms. Li some time in September of 2002?

A. Sometime in the fall, yes.

Q. Okay. The first sequence up at the top of the exhibit it says "Continuing on where I was at. Showed baffle reports/productivity reports. Pull out of system - the more

you can pull with lower error percentage equal better." Did you show Ms. Li baffle reports and explain how the baffle reports demonstrated that you were pulling more with a lower error percentage?

A. Yes.

Q. If you go down a few lines, it says "No, I don't have other copies of other weeks." Do you see that line?

A. Correct. Yes, I do.

Q. You just had the one week?

A. Yes.

(At this time Riser Deposition Exhibit

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A. No, she didn't say that. No. You make small talk. It's like you can tell that you definitely put your time in. It was like small talk. It wasn't --

Q. So if I understand Ms. House's comment then, she's saying that she had not seen other executives take this particular task. They might delegate it, but they wouldn't do it themselves. Is that what she said?

A. It's more -- I guess I'll say yes.

Q. And then Ms. Walters, the trained wrong comment --

A. Yes.

Q. -- what did she say?

A. Literally that, that I was trained wrong and then I'd want her to go into it, so I was like "How am I being trained wrong?" She said you're spending more time in the back room, and that's where Chris Halvorson had me being trained was the back room because Christmas is the head -- the time of the year for the Apple Valley store, and that back room, from restocking the shelves, finding space, which all that's vital. You have to find space. You have to get the products in. You've got two different trucks coming in. You've got to find room. So the majority of the time of my training -- the majority of my time of training was stockroom, was that back room, which she was making a comment where I should have been, you know, on the floor or -- so -- and I took her advice because, you know, she's been there 12 years. Ever since that Apple Valley store opened, she's been there.

Q. You said that you divided up the tasks with the executives; is that right?

A. Yes.

Q. When did that occur?

A. I don't know when it occurred because I was a new hire. I was trained in, so I'm coming into a situation that already exists, so I don't know when that took place.

Q. Do you recall how it was communicated to you?

A. Oh, it wasn't. You just saw it by body language because Chris, he'll have the -- he'll take over the huddle because he'll gather all the information and all of us are right there. And then Desiree, she answered the phones because the majority of time she was up front

because she was planning her wedding, so she spent a lot of time up at the front, so that's where the phone was at all the time so that's the reason she handled the phones. And the vending, since I was in the back room, I did -- most of my training was in the back room. That's why I received he vendors.

Q. So it wasn't that there was a formal division of responsibility? It's merely that's the way it worked out?

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would have been at 50 because you get the bonus -- you get several bonuses, profit sharing of the volume of your store. Since I was in a high-volume store, I would have got a higher bonus as well as the Target turned into a Super Target, from a Greatland to a Super Target, adds more volume, so that throws you up in a higher pay and that's why everybody was very aggressive of being an executive at Apple Valley.

Q. After you graduate from business college, there's no guarantee you'll go to Apple Valley though; right? They could assign you to any other store in the Twin Cities area?

A. Once you're in the business college, they already have us assigned to certain stores.

Q. So you knew you were going to the Apple Valley store if you graduated from business college?

A. Yes, because it was said to me.

Q. How long do executives normally spend at each particular store?

A. Depending on the position, they can spend the whole five years, but they will get experience. They'll

shop around because you'll spend one year in each department. Executive flow at night you spend one year. Hard lines you'll spend a year. Soft lines you'll spend a year, and they just kind of work you then, logistics and

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which I have -- there is a lock-in because of being military points and my brother-in-law being on the force for six years. There was more training for that and then the family business and then St. Kate's came up, so no.

Q. So the first place you actually submitted an application was St. Kate's; right?

A. Yes.

Q. And you got that job?

A. Yes.

(At this time Riser Deposition Exhibit Number 7 was marked for identification by the Court Reporter.)

BY MR. SCHMITT:

Q. Mr. Riser, I'm showing you what's been marked as Exhibit 7. This is your personnel file from Target. Can you take a look at it and tell me if you would agree that that's your personnel file?

A. Yes.

Q. I want you to turn to this page. It's the Orientation Completion page (indicating). It's eight or ten pages in. Is that your signature at the bottom?

A. On the left, yes.

Q. And did you receive orientation on November 11 of 2001?

A. Yes.

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A. No.

Q. Do you know what became of the Milwaukee lawsuit?

A. No. I've been out of the loop.

Q. Do you know that the EEOC brought a class action against Target? Did you know that?

A. Did I know that? Yes.

Q. You did?

A. I don't know if it was a class action. I know they were taking some type of act -- they were taking an action, yes.

Q. Did you know that the court dismissed all the claims and found that no race discrimination had occurred?

A. No.

Q. Why don't you turn to the next page of the document which is the first page of the handwritten notes. Now, I want to actually turn to item number 8 -- or

actually item number 7, I'm sorry, question number 7, so it's (indicating).

A. Gotcha.

Q. Which is on page 3 of the handwritten notes. It's number 7. You say "The only reasons that were given to me on 2-9-02 were that I didn't have the leadership that Target was looking for." Paren, "A former squad leader in the military - okay," end paren. "Also, during my shift, I didn't answer the phones, give huddles. I yelled at an executive and had low productivity." Paren, "all false," end paren. That's what you wrote; right?

A. Yes.

Q. Is it true that what Target told you, that the reason that Target communicated to you why you were being terminated is that during your shift you didn't answer the phones, you didn't give huddles, you yelled at an executive, and you had low productivity? That's why they told you you were being terminated?

A. Yes.

Q. And number 8, and I want you to refer back to the Intake Questionnaire, number -- question number 8, which is "State the specific reasons you believe the actions taken against you was/were the result of discrimination." Okay. And this is -- the number 8 that's in the handwritten notes addresses that question; right?

A. Yes.

Q. So this is your effort to summarize the reasons why you felt you were being discriminated against based on your race; right?

A. Yes.

Q. And this was full and complete at the time you drafted it; right?

A. Yes.

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A. No. Other feedback I received from Chris is when I had my cell phone and my cell phone rang. It was my daughter, and he said "Well, we can't have cell phones as executives." I remember turning that off. So he did correct me on something, so on top of this, that's all I can recall.

Q. So the only feedback you recall receiving from your peers is Chris Halvorson suggesting you should try and conduct a huddle soon?

A. Yes.

Q. And I think your testimony was that occurred the second week of your employment?

A. Yes.

Q. And then feedback that you needed to turn your cell phone off?

A. Yes.

Q. With the exception of those two statements, your position is you never received any feedback from any of your peers?

A. No.

Q. Could you turn back to the previous exhibit for a minute. The handwritten notes page 3, your answer to question number 8, you see the first sentence says "During my employment with Target in Apple Valley, three days shy of three months, nobody gave me any feedback whatsoever."

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Q. What about the cell phone incident? Is that feedback?

A. That's just policy. Feedback as in -- I look at as in performance. That's not a performance feedback. Where other execs at stores received feedbacks. I said "Are you receiving feedbacks?" "Yes. They told me I'm doing this. I'm doing this. I'm doing that" because you need a measuring stick as your performance. Cell phone --

Q. So a violation of -- if someone came up to you and said "You violated Target policy. You shouldn't do that again," you're telling me that wouldn't meet your definition of feedback?

A. That's a different type of feedback. You're letting them -- I guess you can paint it either way, but, I mean, like I said, it could have been a wrong choice of words putting that there. But feedback from my peers – or fellow workers that are not my peers, I didn't receive anything. And I think I made that clear on a lot of other documentations that I submitted, that no feedback from Annette Griffin on down.

Q. Let's stick with Exhibit 8 for a minute which is this one (indicating).

A. This one here (indicating)?

Q. Yes. Could you turn to page 2, just one more page. Okay. There's a description of an incident

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIVIL CASE ON. 03-6094 (JNE/JSM)

- -

Billeigh Riser,

Plaintiff,

vs.

Target Corporation,

Defendant.

- -

DEPOSITION

The following is the deposition of ELIZABETH A. BROWN, taken pursuant to Notice of Taking Deposition, under the Rules of Civil Procedure for the District Courts of the United States, at the law offices of Williams & Iversen, 1611 West County Road B, Suite 208, Roseville, Minnesota, at approximately 10:00 a.m., April 20, 2005, before Carmen J. Howard, a Notary Public in and for the County of Hennepin and State of Minnesota.

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start date?

A. I don't.

Q. Would it be fair to say that it was somewhere in the middle of November?

A. Yes.

Q. So when you started in the program, did you go directly into Target's business college program or were you placed in a store?

A. Went directly into the business college program.

Q. And why don't you walk me through that. How does that start? When you were hired on as an ETL in the business college program, what happened?

A. Our situation, actually, was a little bit different. Normally business college lasts for, I believe, six weeks. You're brought in and you do your classroom training, spend time in stores with different teams, learning all the processes that go on within the store environment. Our particular class of four people was different, in that we did our classroom training for a week and then were placed each in our stores for training through Thanksgiving, Christmas and New Year's, and then we were pulled back out to complete our last five weeks of training with the current team that was going through.

Q. So when you said you were placed your store, were you put in the store that you were going to ultimately work at?

A. We didn't know that at the time, we just knew that that was the store we were going to be training in for that period of time.

Q. And when did you find out it would be the store you ultimately worked at?

A. I don't know the exact date, but it was soon after we went back to the classroom.

Q. So you got thrown in there with not very much training to rely on; would that be accurate to say?

A. Yes.

Q. And you had testified that you were at the Lakeville location of Target in the Twin Cities?

A. Yes.

Q. Or Lake Street, not Lakeville.

MR. SCHMITT: She was at both.

THE WITNESS: I was at both.

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MR. SCHMITT: Objection, foundation, calls for speculation.

BY MS. RING:

Q. -- in your experience as an ETL?

MR. SCHMITT: Same objections.

THE WITNESS: In my experience, I would not personally, as an ETL, probably raise that concern to an STL level.

BY MS. RING:

Q. And in your experience at Target the last four years, have you ever worked with any other African-American ETLs?

A. ETLs or --

Q. The ETL level, managerial level, ETL.

A. No.

Q. Now you testified that you've provided corrective action to team members beneath you at Target?

A. Correct.

Q. Did you provide corrective action for these individuals when they were in their first 90 days of employment, any of them?

A. No, not formal corrective action, just coaching.

Q. And would you document that coaching in any form?

A. Uh-huh. I usually wrote down what we had discussed, and had people sign off on the conversation that we had had.

Q. Was it your understanding that that was a procedure you should do when providing coaching?

A. Yes.

Q. So how long did it take you to feel comfortable and feel like you mastered your position as an ETL?

A. I think, because of the way that we were put in, it didn't take very long, because we really had to come to know our position quickly, in the situation that we went in. Before I knew all the ins and outs of my position, probably six months.

Q. Now upon completion of your 90-day probationary period or learning period, are you aware of whether you received peer evaluations on your performance?

A. Not that I know of.

Q. Have you ever received a peer evaluation?

A. No.

Q. Now were you ever questioned by the Equal

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misinformed, because the ETLs generally report at 8:30, would you consider that person had been tardy for two days?

A. Not if they had been told that they were supposed to be there at 9:00.

Q. Now I just want to clear something up for myself. When you go back to business college in January of 2002, you have classroom time, and then you're going out to different stores?

A. Yes.

Q. So when you go out to the stores, do you do

any hands-on experience?

A. Yes.

Q. So would you like to reevaluate your testimony about not seeing Bill in a work environment?

A. I guess my interpretation was in that training period that we had at different stores. I definitely saw him perform when we were in training sessions together, yeah.

Q. So you would have a basis to evaluate, personally, how he conducted himself when working in a store?

A. True.

Q. And when you went back to business college in January of 2002, would it be fair to say that you spent a large majority of your time working at the Lake Street store, even though you traveled to other stores?

A. Yes.

Q. And in that time, was there any feedback, from any ETLs that you worked with or your STL, that Mr. Riser was having performance problems?

A. Not to my knowledge, no.

Q. And do you recall, in the business school with Mr. Riser, when you went out to the stores, do you recall Mr. Riser being tardy?

A. No.

MS. RING: No further questions.

MR. SCHMITT: Just a couple follow-up.

FURTHER EXAMINATION

BY MR. SCHMITT:

Q. When you went out in the stores to work with Mr. Riser and the rest of the class, what sort of duties were you doing?

A. Any basic store duties. We were working pulls, we were back-stocking things

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIVIL CASE No. 03-6094 (JNE/JSM)

- -

Billeigh Riser,

Plaintiff,

vs.

Target Corporation,

Defendant.

- -

DEPOSITION

The following is the deposition of DESIREE LIENHARD, taken pursuant to Notice of Taking Deposition, under the Rules of Civil Procedure for the District Courts of the United States, at the law offices of Williams & Iversen, 1611 West County Road B, Suite 208, Roseville, Minnesota, at approximately 12:10 p.m., April 20, 2005, before Carmen J. Howard, a Notary Public in and for the County of Hennepin and State of Minnesota.

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college program?

A. Yes, I did.

Q. As part of the business college, did you spend three to five weeks at business college before being placed in a store, or were you sent directly to a store?

A. Business college consisted of three to five weeks of classroom training and then the remainder in a store type training.

Q. I just want to make sure we're understanding each other. Did you do your classroom training first?

A. Yes.

Q. And as part of your classroom training, you had an opportunity to go to different stores and learn how the processes worked?

A. I think we went to two stores.

Q. After your first three to five weeks, I know it varies in some instances, what store were you placed in for your tech training?

A. Apple Valley.

Q. Were you placed in overnight flow at Apple Valley or during the day?

A. During the day.

Q. And how many other ETLs did you work with

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Q. Would those be at the Eagan location or at West St. Paul?

A. They were both at the Eagan location.

Q. And just so I'm sure we're understanding each other, these are all individuals assigned to shadow you?

A. Correct.

Q. So the only person assigned to shadow you at the Apple Valley location would be Jess Piebo?

A. Who had been previously employed at Target, yes.

Q. And that was only for a week?

A. Correct.

Q. And as part of your job duties as an ETL, do you conduct performance reviews?

A. Yes.

Q. Is there a standardized protocol that Target uses when doing their performance reviews?

A. Yes.

Q. Could you describe that for me?

A. Right now, it's ease of excellence, and you rate team leads on energy, enthusiasm, execution and overall excellence.

Q. And is that in writing?

A. It's a format on the computer.

Q. And when we say "team leads" – the performance reviews that you're responsible for as an ETL would be those of the team leads?

A. Correct.

Q. And as an ETL, do you give performance reviews of each other?

A. No.

Q. And if you -- in your managerial role, if you have performance problems with an individual, do you tend to document those?

A. Yes.

Q. What sort of documentation do you do?

A. Word documentation and just . . .

Q. Would that be by e-mail? Do you handwrite it down on a note?

A. On Word. I type it up and give it to --

Q. Oh, you use a word processing system?

A. Yes.

Q. Who do you give it to?

A. Human Relations.

Q. Have you ever done that for anyone in their first 90 days?

A. No.

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THE WITNESS: I absolutely have no idea what the date was.

BY MS. RING:

Q. And based on your own schedules, Mr. Riser -- if you could look at Plaintiff's Exhibit 4 again, based on your own schedule, in your own handwriting, Mr. Riser wasn't scheduled to work on January 4th or January 6th of 2002, was he?

A. Correct.

Q. With respect to No. 4, it states at the bottom of the paragraph, "I heard it from Chris Larson and Linda Mullen, with respect to an alleged interaction that Mr. Larson had with Mr. Riser"?

A. Uh-huh.

Q. Is that accurate, that you have no personal knowledge about what happened? When I say "personal knowledge," I mean, were you there? Did you see it?

A. No, I was not there, did not see it.

Q. So I just want to clarify, so we're understanding each other. When I ask you if you have personal knowledge of something, it means, can you see it, can you taste it, can

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of employment, depending upon how they did during those 90 days.

Q. So it's your testimony that, where it says, "Yes, progressive discipline is used for ETLs," that it's beyond your 90 days, once you're an established ETL?

A. Yes.

Q. But it would be fair to say that the spirit of the coaching and corrective action, the progressive discipline policy, sort of followed in the first 90 days with respect to coaching?

MR. SCHMITT: Object to the form.

THE WITNESS: Coaching is done within the 90 days. There's some sort of coaching that's given in the 90 days. It depends upon the trainee, as to how much coaching is given.

BY MS. RING:

Q. And at some point in time during Mr. Riser's 90 days, were you asked to provide feedback by Chris Simon regarding his performance?

A. I don't remember.

Q. Now in your experience as an ETL, and you've trained five people, if the individual isn't

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Q. Here's a question for you. Have you ever, in your experience as an ETL, reviewed every single baffle report on a trainee that was not your responsibility?

A. No.

Q. Have you ever pulled every single baffle report on a trainee that was your responsibility?

A. No.

Q. Have you ever been given any coaching or corrective action based on your numbers on a baffle report?

A. No.

Q. In your experience training other individuals, have you ever provided coaching on productivity numbers?

A. No.

Q. When you're responsible for coaching an individual, do you look to how many numbers they pull?

A. No -- I'm sorry, did you say "coaching" or "training"?

Q. I meant training.

A. When I'm training, no.

Q. Have you ever known an ETL in training to not make it through the first 90 days based on -- as one of the reasons being their low number of pulls?

A. No.

Q. And when I say "ever known," this is based on individuals you've trained and individuals that you've worked with in your store.

A. Uh-huh.

Q. You need to be audible.

A. No, I've never --

MR. SCHMITT: You can just say "yes" there. I mean, she just wants you to -- you were nodding, and you need to answer verbally.

THE WITNESS: Yes.

BY MS. RING:

Q. Now as a managerial employee at Target, is part of your job being aware of the discrimination policies at Target?

A. Yes.

Q. Would it be a fair statement to say that you have a duty to enforce those discrimination policies?

A. Yes.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIVIL CASE NO. 03-6094 (JNE/JSM)

BILLEIGH RISER,

Plaintiff,

-vs-

TARGET CORPORATION,

Defendant.

DEPOSITION OF CRAIG ROTHFOLK, taken at the law offices of Williams & Iversen, P.A., 1611 West County Road B, Suite 208, Roseville, Minnesota, on the 25th day of April, 2005, commencing at approximately 9:13 a.m., before James A. Woitalla, a Notary Public in and for the County of Hennepin, State of Minnesota, aken pursuant to the Rules of Civil Procedure.

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Valley on November 19th, 2001, would you have any basis to disagree with that?

A. No. I would not disagree with that.

Q. Do you have any recollection over whether after the holiday season that Business College class returned to the classroom on approximately January 18th, 2002?

A. I don't know.

Q. Okay. When did Target begin the Business College module for training employees?

A. The first Business College was -- came out of design in 19 -- because I transferred up here -- '92, 1992.

Q. And what was Target's policy with respect to requiring executive team leads to attend Business College? Let me clarify.

A. Yeah.

Q. To be an executive team lead, which is --

A. Yes.

Q. -- the initial managerial employee at Target. Correct?

A. Yes.

Q. Okay. Did Target require an individual to go through Business College in order to have

* * *

Q. Did you make the recommendation that Mr. Riser be terminated?

A. Chris Simon and myself both made the recommendation.

Q. Were you aware that Mr. Simon had little to no interaction with Mr. Riser as a store team lead?

A. No.

Q. Is this statement accurate that you received feedback from Mr. Riser's technical trainers about his performance?

A. Yes.

Q. Did you solicit that feedback or was it voluntary?

A. It's hard to say one way or the other, because I know Chris volunteered the information, and I asked for more, so --

Q. Chris who? We've got three Chrises in this.

A. Oh. Chris, the technical trainer.

Q. Okay. Would that be Halvorson?

A. Yes.

Q. Are you sure that -- strike that. Let's go to 0512 BR.

A. Uh-huh.

Q. It says there was an e-mail sent recapping by

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about performance problems, would you have any basis to know why that would be the case?

A. No.

Q. Okay. Let's go to 0513. Now, Mr. Rothfolk, you just testified that you don't recall making any of these statements to the EEOC contained on this page. Correct?

A. I do not.

Q. Okay. So just for clarification, did you review any baffle reports in making your recommendation to terminate Mr. Riser?

A. I did not.

Q. Did you compare Mr. Riser's productivity performance to other colleagues in the Business College?

A. I did not.

Q. Okay. So you -- did -- you didn't do anything to verify that Mr. Riser was, in fact, producing at a lower level than the other executives?

A. No.

Q. If I were to state that Mr. Riser's productivity and error rate was comparable to the executives he was working with at the Apple Valley store, would you have any basis

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MS. RING: Okay. Okay. We'll take a break then.

MR. SCHMITT: Okay.

MS. RING: I was just going to finish this up before we go, but go ahead.

THE WITNESS: Okay. Thanks.

(Break taken.)

Q. Mr. Rothfolk, do you recall the bases upon which you terminated Mr. Riser?

A. He was terminated, he was a 90-day probationary employee, failure to meet leadership requirements as an executive of Target.

Q. And do you recall at this time what those -- what the factors were that went into establishing that he was failing to meet the leadership standards of Target?

A. Productivity issues and overall leadership.

Q. Do you recall participating in Mr. Riser's termination meeting in February 2002?

A. Yes.

Q. And who attended that meeting?

A. Myself, Bill, and Chris Simon.

Q. And was there one person that took the

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MR. SCHMITT: Okay.

(Discussion off the record.)

Q. Would it be fair to say that, in your meeting with Mr. Riser on February 6th, 2002, that you didn't discuss any of his performance problems because the decision had already been made to terminate him?

A. I don't think that would be a fair statement at all.

Q. So why didn't you discuss any of his problems with him?

A. That wasn't my role in the meeting. My role in the meeting was to verify that his training was on track and that he felt comfortable with his training, and that we delivered to him what he needed to have to be successful.

Q. So you have an employee that you --

A. Uh-huh.

Q. -- allegedly has performance problems, you're aware of these performance problems, alleged problems, and you sit down and talk to him for 20 minutes about whether you gave him what he needs, but you don't inform him that he hasn't given you what you need?

MR. SCHMITT: Objection. Argumentative. You can answer.

A. If that was the role in my meeting, yes. But it wasn't the role in my meeting. The role in my meeting as the

Business College Dean was to make sure that the training that was needed to be delivered to him was delivered.

Q. So --

A. And that feedback then was passed on to my district manager.

Q. So you didn't think it was important to at any point say, "Hey, Bill, this is what I'm hearing, and if I continue to hear this, you're not going make it through"?

MR. SCHMITT: The same objection.

Q. Are you saying that wasn't your role?

A. Right. That was not my role. My role was to verify his training. I am not the one at the store. Chris Simon and the technical trainers that he was assigned to are the ones that have the direct --

Q. So if I were to tell you that Mr. Simon testified that you were the individual that had the primary responsibility over Bill,

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Q. Did you -- did you solicit feedback from trainers?

A. Yes.

Q. And what trainers are you referring to when you say that?

A. The technical trainers: Chris Halvorson and Desiree. I think there was another overnight employee that was -- or overnight executive.

Q. Would that be Chris Larson?

A. Chris Larson.

Q. And then the final one was feedback from the store team lead?

A. Yes.

Q. In your opinion and with your experience with training as a store team lead, should someone have given Mr. Riser feedback?

A. Yes.

Q. Should someone have informed him that your -- your pull numbers and your error rates were considered for performance?

A. Yes.

Q. If, in fact, Mr. Riser had sworn at Mr. Larson, should Mr. Riser have received some sort of coaching or corrective action?

A. Yes.

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Q. If you have a trainee that has been informed to report to work at 9 p.m., and in fact does so, and then is approximately two, three days later is informed that he was --

that at this store location they start at 8:30, should he be subject to disciplinary action for attendance issues with respect -- i.e., tardiness?

A. If he was told to report to the store at nine and then told by that individual store to report at 8:30, then he should report at 8:30.

Q. Right. Right. But should he be disciplined or -- or have a black mark against his record for those days that he reported at nine?

A. Prior to that?

Q. Yes.

A. No.

Q. Now, would it be fair to say that Apple Valley is one of the busiest stores in Minnesota?

A. Yes.

Q. And that Christmas is one of the busiest seasons at Target?

A. Oh, yes.

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A. Or statement to the -- yeah.

Q. So you have no knowledge as to whether or not Target conducted an internal investigation?

A. No.

Q. Okay. Do you recall whether there were any other African Americans in Mr. Riser's Business College class?

A. In our district's class, no. Not at that time. There was three. I am not sure. I'm thinking of another gal, and I know there was three others in the class, other than Bill. I'm not sure now.

Q. Do you recall how many ETLs in your district were African American in 2001?

A. I don't know. I would be guessing at a number.

Q. Let's do an approximation.

A. I would say --

Q. Less than --

A. -- 2 to 3 percent of the ETL population.

Q. In your district?

A. In our district, yes.

Q. So does Target's policy about their employees reflecting, for lack of a better word, nationalities of the -- or reflecting the community in which they live?

A. Uh-huh.

Q. Does that translate to the management employees, too, or is that merely for the hourly employees?

A. No. That's for management, too.

Q. So Target has a policy of having more African American managers in African American neighborhoods because they would reflect the neighborhood?

A. I don't know if I would agree with that as a Target policy or not. I think they re -- they place ETLs in stores based on the need of that store.

Q. Let me check a few things, and then we may be done here. I'm going to ask one more question. Were you aware of whether or not Mr. Riser received any coaching during the time he was at the Apple Valley store?

A. Well, I guess define "coaching." Are you talking in terms of disciplinary action or coaching in terms of the training and -- and --

Q. Let's do both.

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INTERROGATORY NO. 9: State specifically, and not in summary fashion, your version of the events described in Plaintiffs complaint.

RESPONSE: Target objects to Interrogatory No. 9 on the grounds that it is overbroad and contains information better elicited through deposition. Subject to, and without waiving, this objection, Target states the following:

Mr. Riser was employed with Target as a Business College executive (executive in training) from November 11, 2001 through February 9, 2002. The entirety of his employment was during his Learning Period. Target defines the Learning Period as the first 90 days of employment for all team members. This time gives both parties an opportunity to mutually evaluate whether the employment is a good fit. This Learning Period is communicated to all new Target employees during their New Hire Orientation, which Mr. Riser attended on November 12, 2001. This is also stated in the team member handbook, which Mr. Riser received as well.

Mr. Riser was placed in a training class that Target refers to as Business College. This eight-week training program is designed to prepare all newly hired executives for placement into their first position. The training focuses on leadership skills and Target's culture, as well as the technical aspects of each position and takes place both in the classroom as well as in a store, shadowing an experienced executive. For his in-store portion of training, Mr. Riser was placed in the Target Apple Valley store on November 19, 2001, to shadow three experienced executives, Mr. Chris Halvorson, Ms. Desiree Swartz and Mr. Chris Larson. Mr. Riser's primary trainer was Mr. Halvorson.

During Mr. Riser's tenure at the Apple Valley Target store shadowing these three executives, Target began to question Mr. Riser's ability to be an effective Target executive. During Mr. Riser's first week, Mr. Halvorson

explained to him the importance of executives conducting team huddles. Team huddles are informal gatherings of team members for the purpose of informing the team members about store news and information. Mr. Halvorson explained in detail to Mr. Riser on several occasions the content of the information to discuss and how best to facilitate these meetings. Mr. Halvorson gave Mr. Riser specific information to share, such as, store sales update, number of trucks for the evening, staffing concerns, team productivity numbers, etc.

Mr. Halvorson told Mr. Riser that he should observe Mr. Halvorson conducting several team huddles and let Mr. Halvorson know when he was comfortable conducting one on his own. Mr. Halvorson allowed Mr. Riser 3-4 weeks to become comfortable with his position before he asked him if he would be comfortable conducting his first huddle. It was important for the team members to begin viewing Mr. Riser as a leader in the store. Mr. Halvorson also needed to see Mr. Riser present himself to the group in order to help Mr. Halvorson gauge and assist Mr. Riser in his leadership development. Mr. Riser explained that he was not comfortable yet conducting a huddle on his own and that he needed more time. Mr. Halvorson let several weeks pass before he asked Mr. Riser again if he was ready to give a huddle. Finally, Mr. Riser agreed to conduct his first huddle on Friday, January 4, nearly 6 weeks and 30 shifts since he started in the store. Mr. Riser never showed up for the huddle on Friday, January 4, but rather continued stocking shelves while the huddle took place. Mr. Larson stepped in and conducted the huddle. On Sunday, January 6 Mr. Halvorson asked Mr. Riser why he did not conduct the huddle as he had committed. Mr. Riser smiled at Mr. Halvorson and gave no answer. One week later Mr. Halvorson again asked Mr. Riser to conduct a huddle and he refused.

Several weeks before Mr. Riser began at the Apple Valley Target, the overnight executives informed the team

that Mr. Riser would be joining them as a new executive. During Mr. Riser's his first week on the job, the executives made a concerted effort to introduce Mr. Riser to the team every night during a huddle. As an executive, it was Mr. Riser's responsibility to develop further relationships with the employees after that point. Approximately four weeks after Mr. Riser started, Mr. Halvorson had a conversation with a team member regarding the executives in the department. When the team member responded by saying, "Bill who", Mr. Halvorson became concerned that he had failed to establish any passing familiarity with the team members, let alone a presence as a leader. Clearly, the team did not view Mr. Riser as an executive. Mr. Halvorson once again asked Mr. Riser to conduct a huddle. Finally, by mid January Mr. Riser conducted his first huddle.

Another responsibility of the overnight executives is to answer all telephone calls during the evening. These calls are typically vendors calling to be let in the building or team members calling in sick, both of which are issues that must be handled by an executive. Mr. Halvorson trained Mr. Riser how to answer the phone, put a caller on hold, page someone on the overhead speaker and also explained the importance of answering these calls and that it was the shared responsibility of all the executives. Mr. Riser, however, failed to answer the phones. This became an increased frustration with the executives as it showed a lack of teamwork and initiative, and unduly burdened other executives as well as made it necessary for hourly shift supervisors (called Level 3 employees) to take such calls. This is not a responsibility of an overnight Level 3 employee.

Mr. Riser's pace of work also became a concern. One of the primary responsibilities of the overnight flow team is to pull pieces of merchandise from the stockroom to replenish the shelves in the store. The executives work alongside team members as well as supervise them. Therefore, as a part of Mr. Riser's training, he engaged in this task along with the

other team members, not only to gain a full understanding of the merchandise flow process but to also lead and direct the team members. Required merchandise is located and prepped to be moved to the floor for stocking. This process is referred to as "pulls".

This technology also generates a report that counts the number of pulls an employee completes. Mr. Riser's number of "pulls" or location that he went to is significantly less than the other executives. For example, for the week ending December 1, 2001, the three executives "pulled" 1389, 1148 and 933 merchandise locations, compared to Mr. Riser's total of 283. Two weeks later, for the week ending December *15,* 2001, the three executives "pulled" 2019, 1719, 1075 locations, compared to Mr. Riser's 82. Although Target would not expect Mr. Riser's productivity to be at the same level of the other executives, it would be expected to be much closer than it indeed was. As an executive it is Target's expectation that Mr. Riser set the pace with the rest of the team.

Mr. Riser's punctuality was also a performance concern. During the first four weeks at the store, Mr. Riser arrived late on a number of evenings. The executives were expected to be at the store by 8:30 p.m. to begin the truck unloading process. It is critical to begin this process by 8:30 p.m. every night as there is a very tight sequence of events that needs to occur on the overnight process to ensure the store is stocked and physically prepared to serve guests by store opening the next day (8:00 a.m.). After several weeks of arriving 20-30 minutes late, Mr. Halvorson spoke to Mr. Riser about the importance of arriving by 8:30 p.m. He explained to him that his first half hour is the most important part of setting the tone for the evening and to ensure the team gets off to a good start. The next night, Mr. Riser arrived to work at 8:50 p.m. Throughout his training at Target, Mr. Riser continued to be late on occasion.

One evening in late December or early January, Mr. Riser was unloading a trailer of freight with Mr. Larson. Mr. Larson was pulled away from this task around 11:00 p.m. to assist a team member who just had an accident. When Mr. Larson returned around 11:45 p.m., Mr. Riser became confrontational with him. He approached Mr. Larson in a threatening manner and yelled in front of other team members, "where the fuck were you?" Mr. Larson was very uncomfortable, but did not respond to Mr. Riser's inappropriate comment. This conduct alone is grossly inappropriate, particularly coming from an executive. Executives are expected to model Target standards. Profanity and verbally abusive behavior is clearly inappropriate. This type of conduct would ordinarily result in formal Coaching and Corrective Action (Target's progressive disciplinary policy) if an employee is beyond their 90-Day Learning Period. Employees in the Learning Period are not governed by this policy, but rather incidences such as this are factored into the ultimate decision to continue employment beyond the 90-Day Learning Period.

By this time Mr. Riser was nearing the end of his Learning Period. As stated above, this is a period of time in which the company evaluates a team member's performance to determine if continued employment is warranted. Mr. Craig Rothfolk, a store manager and coordinator of Business College, met with Mr. Riser on February 1, 2002 to discuss the training he had received. Mr. Riser told Mr. Rothfolk during that meeting that he felt he had been given sufficient training and never once did Mr. Riser raise the concern that he felt he that he had been treated differently or unfairly. Based on Mr. Riser's lack of leadership and unprofessional conduct during his Learning Period, Target made the decision to terminate Mr. Riser's employment on February 9, 2002.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIVIL CASE NO. 03-6094 (JNE/JSM)

- -

BILLEIGH RISER,

Plaintiff,

vs.

TARGET CORPORATION,

Defendant.

- -

DEPOSITION OF CHRIS SIMON, taken pursuant to Notice of Taking Deposition, and taken before Candace A. Kolehma, a Registered Professional Reporter and Notary Public in and for the County of Ramsey, State of Minnesota, at 1611 West County Road B, Roseville, Minnesota, on April 18, 2005, commencing at 12:55 p.m.

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A. Based --

MR. SCHMITT: I'll object. Assumes facts not in evidence, but go ahead.

THE WITNESS: Well, based on information from the rest of the executives, they told me he did not lead any.

BY MS. RING:

Q. Did you verify that with Mr. Riser?

A. No.

Q. And at that time period of November 2001 to April of 2002, Mr. Riser was the only African-American ETL at his level; correct?

A. At that store?

Q. Yes.

A. Yes.

Q. Okay.

A. Actually, that's not correct. There was one more.

Q. What was that other individual's name?

A. That was senior merchant or super merchant. He was an ETL, but he was actually one position up from him.

Q. That's why it's confusing. You call them all ETLs --

A. Sure.

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Baffle reports?

A. It can be many different tools.

Q. What other tools besides the Baffle report would you say can measure activity?

A. It can be different for each position in the store.

Q. We're talking specifically about Mr. Riser's position.

A. You can look at the trailer unload time, you can look at their push time, as far as how long it takes them to complete an area for working the freight. You can look at how long it takes them to work auto fills, how long it takes them to hold auto fills.

Q. Do you have any personal knowledge whether any of those issues you just listed, trailer unload time, push time, auto fills, how long it takes to pull or do fills, whether that was analyzed in the decision to terminate Mr. Riser?

A. What I remember was the number of auto fills completed.

Q. Would that be reflected on a Baffle report?

A. It should, yes.

Q. Isn't it true that executive team leads aren't expected to do as many pulls as the other team

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store.

MR. SCHMITT: To business college? Or just returned to the --

MS. RING: To the store from business college.

THE WITNESS: It happened at Apple Valley.

BY MS. RING:

Q. Okay. I'm going to rephrase the question. Were you aware that the three weeks prior to Mr. Riser's termination he was at business college and not in your store?

A. Yes.

Q. Okay. Were you aware that he had been back at your store for just a few days when he was -- when the decision to terminate him was made?

A. As far as how many days, I cannot tell you.

Q. So then you had a meeting with Mr. Riser?

A. Correct.

Q. And who was in attendance at this meeting?

A. Myself, Bill, and Craig Rothfolk.

Q. Did you actively participate in this meeting?

A. Yes.

Q. And I want to clarify that. Did you run the meeting or did Craig

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A. Right. I said the way the situation is that that would not be an option.

Q. Have you had any other executives in the training program not make it through their 90 days?

A. Yes.

Q. By choice or by termination?

A. Both.

Q. Okay. How many would you say other than Mr. Riser have you had not make it through?

A. I don't have a specific number.

Q. Do the majority of the people make it through? Would that be fair, though?

A. Yes.

Q. Did you ever consider sitting down with your fellow -- with the other executives in flow and Mr. Riser to get a better feel for how they were training him?

A. They were the best at what they do and I felt perfectly capable of hearing what they had to say and take it as fact.

Q. So you felt no obligation to look into whether it was an accurate representation of Mr. Riser's work?

A. I felt, based on everything that was brought up, that it was fair.

Q. Without ever talking to Mr. Riser?

A. Correct.

Q. So other than the lunch meeting and the termination meeting, did you ever have any interactions with Mr. Riser?

A. We would sit down either before the shift would start, if I was closing, with the flow executives that were on that night, or in the morning with staff, whoever was there in the morning when I came in.

Q. Isn't it true that Mr. Riser would stay later and do walk-throughs with the morning people when you were there?

A. All of the execs would, yes.

Q. All the time? All the execs would stay late and see how the morning flow works just to learn more or to be a hard worker?

A. The overnight :execs, they would all stay until the opening people would get there and they would walk the floor with them.

MS. RING: I think we should take a ten minute break.

MR. SCHMITT: That's fine.

THE WITNESS: Okay.

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time frame and what positions you're talking about, but go ahead.

THE WITNESS: I have to think about it. What exactly are you referring to? As far as executives or team members or --

BYMS. RING:

Q. We can do it during your entire career or by five years, if you want. And by executives, I mean managerial employees.

A. I can think of three.

Q. And that is over the course of your career?

A. As far as being a store manager.

Q. Okay. And just so we can clarify it for the record, that's any level managerial employee. That could be flow person, just your regular entry level ETL. It could be a merch, it could be someone in logistics, it could be HR.

A. Three that I remember.

Q. So when you went to Apple Valley, was a lot of your role while there focused on converting the store to a --

A. No.

Q. -- Super Target?

A. No.

Q. But you were brought there for -- as one of the

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CIVIL CASE NO. 03-6094 (JNE/JSM)

BILLEIGH RISER,

Plaintiff,

-vs-

TARGET CORPORATION,

Defendant.

DEPOSITION OF CHRISTOPHER HALVORSON, taken at the law offices of Williams & Iversen, P.A., 1611 West County Road B, Suite 208, Roseville, Minnesota, on the 25th day of April, 2005, commencing at approximately 12:39 p.m., before James A. Woitalla, a Notary Public in and for the County of Hennepin, State of Minnesota, taken pursuant to the Rules of Civil Procedure.

* * *

Q. As a managerial employee of Target, do you have a duty to enforce those discrimination policies?

A. Yes.

Q. Do you have a duty to enforce compliance or assure compliance of those policies?

A. Yes.

Q. Okay. In the fall of 2001, were you assigned to be the technical trainer for Bill Riser?

A. Yes.

Q. And as a technical trainer, you're the primary individual that Mr. Riser would have shadowed as part of his Business College class?

A. Correct.

Q. Were you aware that when Mr. Riser was placed in your store in -- on November 19th, 2001, that he had only received one week of Business College training?

A. Yes.

Q. Were you aware that Mr. Riser was an outside hire with no previous Target experience?

A. Yes.

Q. Were you aware, though, that Mr. Riser had significant supervisory experience prior to

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Q. Okay. What were your concerns with Mr. Riser's performance?

A. The inability to show his leadership skills to our team. By not performing the duties that we, as leaders, were expected to perform, whether it be the huddles, answering phone calls. The overall performance, even not outside of the manager part of it, as a -- as a physical part of performance,

pallet -- he could not pull a pallet as fast as even my team members could. His numbers in the back room were not to the level that they should have been. And his overall interaction with the team was not to the standards of a leader in the fast, fun, and friendly environment that we try and create.

Q. Okay. Okay. What are these supposed duties that he wasn't showing leadership abilities on?

A. Well, I spoke to holding huddles, answering the phones.

Q. So why is answering the phone five times a night a leadership quality?

A. Because the team knows that unless we are tied up in a situation, if I'm the only exec

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Q. Did you feel, as Bill Riser's tech trainer, that he just didn't really fit in as a manager at Target?

A. Can you ask that again?

Q. Did you feel that, as his tech trainer, that Bill just didn't fit in as a manager?

A. Yes.

MR. SCHMITT: Object. I was going to say object to the form, but go ahead.

Q. Did you regularly keep track of Mr. Riser's attendance?

A. No.

Q. Did you regularly keep track of Mr. Riser's alleged tardiness?

A. No.

Q. Is it true that Apple Valley's the highest producing store in Minnesota?

A. Sales-wise?

Q. Yes.

A. Yes.

Q. So there's a lot of inventory turnover --

A. Yes.

Q. -- at Apple Valley? Would you say that would make it one of the more difficult locations to do overnight

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Q. Now, you also just testified to some team reports. You said there was a cartons per hour report and a truck unload report. Would that -- is that what it's called?

A. Trailer management tool.

Q. Okay. Which meant -- which measures your truck unload time. Is that fair?

A. Yes. It gives you a goal of how many hours it should take to unload -- how many hours of -- man-hours, payroll hours it should take to unload a truck.

Q. Okay. And what was it again? The trailer management --

A. Tool.

Q. Tool. You said there was a few other reports. What other team reports are there?

A. I don't really recall any. Those are the three major reports.

Q. Okay. So the three major reports are the baffle report, the carton per hour report, and the trailer management tool?

A. Yeah.

Q. Okay. In evaluating Mr. Riser's productivity, did you also look at the

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